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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NEW ENERGY COMPANY OF INDIANA,
Appellant,

v.

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO, MARY ELLEN WITHROW,
TREASURER OF OHIO, and SOUTH POINT ETHANOL,
Appellees.

On Appeal from the Supreme Court of Ohio

APPELLANT'S REPLY BRIEF

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I. OHIO'S GRANT OF AN ETHANOL SALES TAX CREDIT DOES NOT MAKE IT A "MARKET PARTICIPANT" WITHIN THE MEANING OF *HUGHES v. ALEXANDRIA SCRAP CORP.*, 426 U.S. 794 (1976).

In an eleventh hour effort, appellees seek shelter under the market participant doctrine, invoking a theory they did not raise in the Ohio courts. The State of Ohio seeks to place its sales tax credit reciprocity provision, R.C. 5735.145(B), entirely outside the Commerce Clause with the assertion that "because Ohio is expending its own funds by granting tax credits to subsidize the use of

ethanol it was a market participant and thus falls under the rule of [*Hughes v.*] *Alexandria Scrap* [*Corp.*, 426 U.S. 794 (1976)]." Brief of Appellees Joanne Limbach, Tax Commissioner of Ohio, and Mary Ellen Withrow, Treasurer of Ohio (hereafter "Ohio Br.") pp. 13, 5.[1]

More modestly, Ohio and New Energy's Ohio competitor, appellee South Point Ethanol, assert that the Commerce Clause is not applicable to Ohio's sales tax credit because the commerce in ethanol "was created, in whole or in substantial part, by the subsidies provided," Ohio Br., pp. 13-14, "is dependent for its existence upon the very form of governmental incentives at issue on this appeals," Brief of Appellee South Point Ethanol ("South Point Br."), p. 2, and "is the result of massive state and federal investment," Brief of the State of Illinois as Amicus Curiae In Support of Appellees ("Illinois Br."), p. 3.

Acceptance of appellees' contentions would virtually eliminate Commerce Clause constraints from many if not most of the protectionist and discriminatory tax measures struck down by this Court as well as others, since all these measures could be said to involve an "expenditure" of the "state's own funds" insofar as they operate by foregoing some tax revenues while collecting others. Appellees' contentions also misconstrue the market participant doctrine, and are factually unfounded.

A. Sales Tax Credits Such as Ohio's Are Not Exempt From Commerce Clause Constraints.

Although "the line between 'market participant' and 'market regulator' is not always bright," *White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 217-18 (1983) (Blackmun, J., dissenting), and has frequently

[1] "Ohio through its ethanol tax credit has entered the market through a state-funded subsidy to stimulate the market by making ethanol more economically attractive as an alternative for lead in gasoline." (p. 5).

divided the Court, it is clear that the grant of sales tax credits such as Ohio's, even if adopted to foster new or struggling industries, does not bring the doctrine into play.

The market participant doctrine, as explicated most fully in *Reeves Inc. v. Stake*, 497 U.S. 429 (1980), *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), (plurality) *White*, and *Alexandria Scrap*, deals with an "identifiable class of economic activity in which the city [or State] is a major participant," *White v. Mass. C'cil*, 460 U.S. at 211 n.7, as purchaser or seller. The "single inquiry [is] whether the challenged program constituted direct state participation in the market." *Id.* at 208. "State proprietary activity" must be involved, in which the State acts as a "private business," with the "long recognized right of trader and manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal," often "burdened with the same restrictions imposed on private market participants. [footnote omitted] Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedom from federal constraints, including the inherent limits of the Commerce Clause." *Reeves, Inc. v. Stake*, 447 U.S. at 438-439; *White v. Mass. C'cil*, 460 U.S. at 207 n.3. See also *id.* at 218-19 (Blackmun, J., dissenting); *South-Central Timber Development Inc. v. Wunnicke*, 467 U.S. at 96-99. As Justice Powell, author of *Alexandria Scrap*, explained,

> "In procuring goods and services for the operation of government, a State may act without regard to the private marketplace and remove itself from the reach of the Commerce Clause. . . . These categories recognize no more than the 'constitutional line between the State as government and the State as trader.' *New York v. United States*, 326 U.S. 572, 579, 66 S. Ct. 310, 90 L. Ed. 326 (1946)."

Reeves, Inc. v. Stake, 447 U.S. at 450.

A plurality of the Court followed out the private-trader logic in *South-Central Timber* when it applied one of the "restrictions imposed" on "private market participants" by limiting to the immediate transaction Alaska's ability to require in-state processing of timber that it owned and sold, citing the common law on restraints on alienation and antitrust law. 467 U.S. at 98.

In enacting its sales tax credit, Ohio has manifested none of the attributes of a "private business," engaged in "propriety activity." Unlike Maryland, South Dakota and Massachusetts, Ohio bought nothing, manufactured nothing, and sold nothing. Instead, it has engaged in taxation, a quintessentially governmental act with a "political character," *Reeves, Inc. v. Stake*, 447 U.S. at 439 n. 12, an act that the Commerce Clause was directly concerned with. It has acted "as government" and not "as trader," *id.* at 450 (Powell, J.), and its activities directly implicate the Commerce Clause. As the Court observed in *Reeves, Inc. v. Stake*, "the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national market place," citing Tribe, *American Constitutional Law* 336 (1978): "The Commerce Clause was directed, as an historical matter, only at regulatory *and taxing actions* taken by states in their sovereign capacity." (emphasis added) 447 U.S. 429, 436 (1980); see also *Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 810 n.20 (indicating concern about "discriminatory taxes"). A sales tax credit designed to promote local industry is a prime example of such "taxing actions." See, *e.g.*, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

Ohio and South Point focus on the "expenditure" of state funds involved in the credit, and call this "market participation." They would equate such disparate matters as a state's differential taxation with a state's purchase of printing services for its own use, see *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.

1972) (three-judges), cited in *Reeves*, 447 U.S. at 437 n. 9.

Such a broad-sweeping economic analysis, which does violence to the historical and other bases for both the Commerce Clause and the market participant doctrine, would "swallow up" the Commerce Clause. This Court has not accepted such reasoning. It has recognized the need to put "limits on state or local governments' ability to impose restrictions" in market participant cases. *White v. Mass. C'cil*, 460 U.S. at 211 n. 7, and has not been overly receptive to claims of economic equivalence. In *South-Central Timber*, for example, the Court refused to allow Alaska to require in-state processing of the timber it sold, even though Alaska effectively subsidized the processing by charging "a significantly lower price for the timber than it otherwise would," 467 U.S. at 85, and could have achieved the same economic effect by other means. *Id.* at 98-99.[2] In the intergovernmental tax area the Court has focused on the specific legal incidence of the tax, and not on the actual and often indeterminate economic burden. See Tribe, *American Constitution Law* (2d ed.) 514-521 (1988).

Furthermore, as the Court said in a different context,

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' . . . As Mr. Justice Holmes commented in a related context 'a page of history is worth a volume of logic.' New York Trust Co. v. Eisner, 256 U.S. 345, 349,

[2] The Court imposed a different kind of limitation when the market participant doctrine threatened to swallow up rights under the Privileges and Immunities Clause. *United Bldg. Trades Council v. Camden*, 465 U.S. 208 (1984). *Cf. Hicklin v. Orbeck*, 437 U.S. 518 (1978).

65 L. Ed. 963, 982, 41 S. Ct. 506, 16 ALR 660 (1921)."

Walz v. Tax Commission, 397 U.S. 664, 675 (1970). *Cf. Marsh v. Chambers*, 463 U.S. 783 (1983) (history overrides rule of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). The claims of history are as great in Commerce Clause matters as anywhere else. See *Alexandria Scrap*, 426 U.S. at 809 n. 16.

Even when there is a market participation element, the Court has not always exempted state action from the Commerce Clause. In *Sporhase v. Nebraska*, 458 U.S. 941 (1982), the Court noted that "the natural resource has some indicia of a good publicly produced and owned in which a state may favor its own citizens in time of shortage. See *Reeves, Inc. v. Stake*, 458 U.S. at 957." The Court nevertheless struck down the reciprocity provision, applying strict scrutiny. In *South-Central Timber*, Alaska was selling its own logs and was subsidizing the processing, but that did not give it *carte blanche* to impose any conditions it wanted.

The reason for the Court's reluctance is obvious: appellees' approach could well result in the market participant doctrine "swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry." *South-Central Timber*, 467 U.S. at 98. Blatantly discriminatory tax levies could be imposed by raising taxes for all and giving credits to some. Exclusion can be achieved through selective taxation.[3]

[3] Thus, in *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976), instead of imposing a ban on milk from states that refused to enter into a reciprocity agreement with Mississippi, if that State chose instead to create tax credits only for milk from states that entered into such agreements, then on appellees' reasoning, that measure would have been completely immune to Commerce Clause scrutiny, despite its being identical in purpose and effect to the measure Mississippi did adopt.

Appellees' position would require the reconsideration and almost certainly the overturning of a vast number of discriminatory tax cases, including many recent decisions. For example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), Hawaii imposed a 20% excise tax on sales of liquor at wholesale, but exempted (1) okolehao brandy in order to "encourage and promote the establishment of a new industry," and (2) pineapple wine, a "nonexistent . . . liquor industr[y]." The State tried to justify its exemptions because these were "struggling" industries. The Court rejected this flatly, saying

> "we perceive no principle of Commerce Clause jurisprudence supporting a distinction between thriving and struggling enterprises under these circumstances, and the State cites no authority for its proposed distinction. In either event, the legislation constitutes 'economic protectionism' in every sense of the phrase. It has long been the law that States may not 'build up [their] domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States.' *Guy v. Baltimore*, 100 U.S. 434, 443, 25 L. Ed. 743 (1880) . . . . [T]he propriety of economic protectionism may not be allowed to hinge upon the State's—or this Court's—characterization of the industry as either 'thriving' or 'struggling.'" 468 U.S. at 272-73.

That same term, the Court rejected an effort to uphold a franchise tax credit that served as a subsidy and an incentive to engage in export trade, a purpose Congress was also promoting. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 405 (1984). The New York Tax Commission argued that the credit was "a subsidy to American export business generally," to which the Court unanimously replied, "a State may not encourage the development of local industry by means of taxing measures that 'invite a multiplication of preferential trade areas' within the United States, in contravention of the Commerce Clause. *Dean Milk Co. v. Madison*." 466 U.S. at

405. See also *Archer Daniels Midland Co. v. State*, — Minn. —, 315 N.W. 2d 597 (Minn. S. Ct. 1982) (tax credit may not be denied to out-of-state ethanol); *Miller v. Publicker Industries*, — Fla. —, 457 So. 2d 1374 (Fla. S. Ct. 1984) (same re foreign ethanol).

Similarly, in *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977), New York gave a tax credit to non-residents who engaged in stock transactions involving an in-state sale. The purpose was to reduce the competitive disadvantage New York was suffering from imposing a stock transfer tax. The Court unanimously ruled that the stock transfer tax reduction was discriminatory. These and many other cases involving tax credits, *e.g.*, *Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 107 S. Ct. 2810 (1987); *Armco, Inc. v. Hardesty*, 107 U.S. 638 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981), would all have to be reexamined and probably overturned if a state becomes a "market participant" simply by granting a sales tax credit.

In these decisions, the market participant doctrine was not even mentioned, and for good reason: A state sales or franchise tax credit is not "proprietary activity" in which the state acts like a "private business", "burdened with the same restrictions imposed on private market recipients."

Justice Scalia summed up some of the relevant considerations just last term in this way:

> Courts can avoid arbitrariness in their review [of taxes on interstate and intrastate activities] only by policing the entire spectrum (which is impossible), by policing none of it, or by adopting rules which subject to scrutiny certain well-defined classes of actions thought likely to come at or near the discriminatory end of the spectrum. We have traditionally followed the last course, confining our disapproval to forms of tax that seem clearly designed to discriminate, and accepting the fact that some amount of discrimination may slip through our net. *A credit against intrastate taxes falls readily within the highly suspect category. . . .*" *American Trucking Ass'n v. Scheiner*, 107 S. Ct. 2829, 2852 (1987) (dissent) (footnote omitted) (emphasis added).

B. The Ethanol Market Was Not "Created" By the Tax Credit.

South Point Ethanol argues that the ethanol commerce in question "is dependent for its existence upon the very form of governmental subsidy at issue in this appeal." South Point Br., p.2. The argument is factually unfounded and doctrinally irrelevant.

Appellees submitted virtually no evidence as to the "creation" of the ethanol market.

As appellant's Statement of the Case indicates, the energy crisis made ethanol a desirable motor fuel component. Publicly available official information and passing references in the record indicate that ethanol became commercially viable primarily because of the federal subsidy, and additionally with the aid of a wide variety of production grants, loan guarantees and other devices, almost all of which were provided by the *federal* government. See Illinois Br. pp. 6-8 n.5. A recent congressional study found that the federal government's array of incentives and particularly the exemption from the *federal* excise tax on gasoline, "made the use of 'gasohol' economically competitive; [and] the blend began appearing in the market in 1979." Siegel, Carr, Gelb & Melke, *Analysis of Possible Effects of H.R. 2052, Legislation Mandating the Use of Ethanol in Gasoline*, Cong'l Research Service Report for Congress 87-819 SPR, p.6 (Oct. 13, 1987). The Federal Department of Transportation records indicate there were ethanol sales in Ohio in 1979 and 1980, during the gasoline shortages, and before the legislation was enacted, Department of Transportation, *Highway Statistics Summary to 1985*, No. 050-001—00301-5 (undated) p. 21, and Brazilian pro-

ducers were also trying to sell in Ohio in the early 1980's. J.A. 101, 113; Transcript of March 1, Hg. 33-34, as well as elsewhere. See *Miller v. Publicker Industries*, *supra*.

The next great boost to ethanol sales came from the federal lead phase-down regulations in 1985, J.A. 101, 113, which made ethanol desirable as an octane enhancer to replace lead.

The record also indicates the importance of such other factors as the price of corn, J.A. 56, and the price of gasoline, J.A. 86. (The lower the corn price and the higher the gasoline price, the more competitive is ethanol.) Moreover, the importance of the kind of incentives used by other states like Indiana is demonstrated by the fact that Indiana was and remains one of the largest users of ethanol and New Energy continues to produce and sell ethanol, in Indiana and other states, *e.g.*, Michigan, that have no tax or other incentive at all. Indeed, as noted in the appellant's Statement of the Case, numerous states have repealed their tax incentives, but ethanol usage has been rising sharply, and in many states like Indiana, Michigan, California and Colorado, without any incentives. See Alcohol Outlook, March 1988, p.6.[4] One cannot really know, therefore, how important the Ohio sales tax credit is. At the very least, there is no way to know how the Ohio ethanol market would have developed without Ohio's tax credit, given these other factors.[5]

[4] The absence or repeal of incentives is a matter of public record or public legislation, as is the increase in ethanol usage in these states. None of appellant's factual statements on this matter have been challenged.

The relevant page of the March 1988 issue of Alcohol Outlook is attached hereto as an Appendix.

[5] Appellees and Illinois suggest that the tax credit did not "drive" New Energy "out of the Ohio market;" Illinois Br. 16. Also, Ohio and South Point try to distinguish *A&P* by drawing a distinction between an "absolute bar" and a tax. Ohio Br. 24-25. But if the latter is a meaningful distinction—and there is no reason to believe it is, given the trial court's finding as to the effect of the denial of the tax credit, J. St. A. 58a—then this implies that New Energy was not barred from the Ohio market, and *could* compete there without the tax credit. If that is true, then that implies a market can exist without the sales tax credit and was not created by it.

There is thus no basis for South Point's claim that the commerce in question was "made possible" by the Ohio legislation. Just as in *Alexandria Scrap*, where the record was ambiguous as to whether Maryland actually did create the market, the record is equally ambiguous here.

Moreover, a constitutional doctrine that turns on "creation", in "whole or substantial part" of a market, would be almost impossible to apply. How long does the exemption from the Commerce Clause apply—indefinitely, even when as here, it is clear the market can get along without the credit? Do the courts have to continuously review and evaluate when the market is sufficiently mature to do without the credits and should become subject to the Commerce Clause? And how "substantial" must a "substantial part" be? Here, Ohio had some ethanol trade in 1979-80 before its tax credit, which was adopted in 1981 when South Point was formed.[6]

What, indeed, does "creation" mean? Illinois strongly presses the point that Ohio created this market, but on the same page it notes that the "corn and cereal grain industry is also supported by massive state and federal involvement." Illinois Br. p.3. Does this mean that the supporting States are market participants and can, for example, limit sale of corn and cereal grains to in-staters? Can limit this industry's employment to in-staters? Compare *Reeves v. Stake* and *White v. Mass. C'cil* with *H.P. Hood and Sons v. Du Mond*, 336 U.S.

[6] The record contains testimony that a tax credit is "not necessarily" the "best way" to provide incentives but only "the way it has been generally used." J.A. 113. But see J.A. 26. It is clearly not the only way.

525 (1949), *Hicklin v. Orbeck*, 437 U.S. 518 (1978), and *Hughes v. Oklahoma*, 441 U.S. 322 (1979). Suppose Ohio had financed research into a new kind of cereal grain or on technology lowering costs for ethanol production. Could it exclude products from a company in another state utilizing the fruits of that research? Suppose Ohio spent some money to support development of its natural resources. Could it prohibit the export of such resources? Compare *Sporhase*.

Appellees emphasize the testimony of New Energy's president that New Energy could not operate without the tax credit, as evidence that the commerce was "created" by the incentive. But that testimony related to conditions *at that time*—he referred to the comparative prices of gasoline and gasohol "at this time," his costs "today", and what New Energy could "currently do . . . today." J.A. 64-65. New Energy and ethanol's competitiveness would also change with increases in the gasoline price, J.A. 89, and did improve markedly when the lead phase-down rules became effective, shortly after the hearing. 40 CFR 80.20 (1987); J.A. 101-02. This was also a market where the other major competitors were receiving tax credits, see Transcript of March 29, 1985, p. 38 ("We have to be at the same price as they are or we couldn't sell.") Had Ohio not created a discriminatory tax structure, New Energy would have been able to participate in the Ohio market on a level playing field with the other market members, as in Indiana, where the termination of the credit was not fatal "because everyone loses that, not just the New Energy Company of Indiana." J.A. 90.[7]

In sum, appellees cannot avail themselves of the market participant doctrine to hide the sharp conflict between the Ohio forced reciprocity statute and the Commerce Clause.

[7] Illinois even suggests that New Energy could have continued in the Ohio market without the credit. See also the Ohio—South Point distinction between an "absolute ban" and the Ohio credit, p. 10 n.5.

II. OHIO'S RECIPROCITY PROVISION IS SUBJECT TO STRICT SCRUTINY.

Appellees and *amici* challenge appellant's reliance on the recent reciprocity cases. Asserting that these cases do not consider reciprocity arrangements to be always facially discriminatory, they seek to distinguish them because they impose "absolute bars."

Appellant cited these cases for the proposition that forced reciprocity arrangements—*i.e.*, reciprocity "invitations" backed up by threats to exclude the outsider from the market—face strict scrutiny, and are subject to the least drastic alternative test. Both *Sporhase v. Nebraska* and *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976) support that. See *Sporhase*, 458 U.S. at 957; *A&P*, 424 U.S. at 377. *A&P* even raised the possibility that *voluntary* reciprocity agreement might excessively burden commerce. 424 U.S. at 379 n. 13.

The fact that New Energy is taxed, and Louisiana milk was barred is irrelevant, as noted in appellant's brief, pp. 24-26. Even the presence of a market participation element does not save a mandatory reciprocity agreement, even where unlike here, the reason for the reciprocity—protection of a state's scarce water supply—is fully accepted. *Sporhase v. Nebraska*.

Ohio's reciprocity statute has excluded New Energy from the Ohio market. *Amici* Illinois, Idaho as well as several other states have such statutes and Missouri is adopting one. Should the Ohio statute be upheld, reciprocity statutes currently not being enforced, will be, and more states may adopt such laws. New Energy and other producers from Indiana and the other 24 states that have no credit will be excluded from Ohio, Illinois, and the other reciprocity states. Moreover, the different tax rates will produce different taxation even among states that give credit. See appellant's Br., pp. 22-23. We will truly have a patchwork of most-favored-nation enclaves, precisely what the Framers tried to prevent.

III. A. IMPROVING HEALTH WAS NOT THE PURPOSE OF THE RECIPROCITY PROVISION.

Despite appellees' continual reiteration that the purpose of the sales tax credit was to protect the health of Ohio's residents, they cannot escape the fact that despite their arguments, no court has so found.[8] See Appellant's Br. 28, 33-34. The evidence as to retaliation and pressure is undisputed.

South Point argues that the testimony of New Jersey's president referred only to "*his* belief that South Point lobbied to put pressure on Indiana to enact an ethanol tax credit." South Point Br. 26; emphasis in original. But New Energy's president testified to what South Point General Manager Lauren Hill "had *told* me the reasons why they were lobbying so heavily for it so they would put pressure on Indiana." J.A. 123 (emphasis added). This is not just the witness' belief. Moreover, this testimony was not only never contradicted, it was not even challenged when Mr. Hill testified. When asked whether he had supported the reciprocity legislation to "put pressure on Indiana to pass legislation," he did not deny it, but said vaguely that he was interested in providing an "incentive to all states." In practice, however, this meant only Indiana, for, as noted in appellant's brief, all the other neighboring states already had tax credits and only Indiana had repealed its credit.[9]

[8] The trial court did accept Ohio's Proposed Finding that it was "conceivable" that the reciprocity provision had several purposes, and appellant stands corrected. See appellant's Br. p. 13. But as stressed in appellant's brief, the trial court pointedly refused to find that health was in fact one of the legislative purposes and found only that "promoting domestic industry *and* to affect the policies of other states to grant reciprocal tax credits" were the legislative purposes. J.St.A. 63a (emphasis in original).

[9] South Point Ethanol asserts at one point that the Indiana tax was repealed "in anticipation of New Energy's entry into the market," replacing the credit with a production incentive. South Point Br. 7. There is no evidence of "anticipation" or other causal link between Indiana's tax credit repeal and New Energy's entry. New Energy tried to introduce evidence on this matter (which would have shown other reasons) but the trial court refused to allow such testimony. J.A. 69; Transcript of Mar. 24, 1985 Hg. at 38.

The National Governor's Association, *et al.* brief describes the Indiana tax credit as reciprocal. Brief of the Nat'l Governor's Ass'n *et al.*, pp. 4, 9. This is incorrect. See J.A. 67-68.

South Point seems to argue that even a retaliatory tax is permissible, citing *Western and Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648 (1981) ("retaliatory insurance tax"). But that was a Fourteenth Amendment equal protection case, where rational-basis scrutiny applies, not a Commerce Clause case where much more stringent standards govern and where avoiding retaliation is a primary goal. Nevertheless, appellees treat the two constitutional provisions identically throughout. See Ohio Br. 20; South Point Br. 18. And even under the Fourteenth Amendment Justices Stevens and Blackmun deplored "the practice of holding hostages to coerce another sovereign to change its policies." 451 U.S. at 674, which is precisely what Ohio is doing here. Under the Commerce Clause, such hostage-taking is clearly unacceptable. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935) and *A&P*.[10]

[10] South Point also challenges appellant's claim that if health had really been the primary purpose, there would not be so many exceptions. In response to the exception for ethanol made from sugar, South Point stresses that most ethanol is made from corn, apparently implying that the exclusions are unimportant. But Brazilian ethanol is barred and Brazilian producers were originally in the Ohio market. Transcript of March 1, 1985 Hg. at 62 (bar to further Brazilian imports because of Ohio Rev. Code § 5735.145); J.A. 101, 120. And there were many other exclusions, see Appellant's Br. 33-34, including at least three major ethanol sources in Iowa and Illinois that use gas instead of coal to fire their plant, see J.A. 122. Nor does South Point explain why Ohio excludes ethanol from states that provide other kinds of incentives, like Indiana, when that incentive successfully promotes the use of ethanol. Compare *Westinghouse Elec. Corp. v. Tully*, 466 U.S. at 405 (limitation inconsistent with purported intent).

B. NEW ENERGY HAS SUFFICIENTLY DEMONSTRATED THE BURDEN ON COMMERCE.

Appellees revert to the argument that (a) New Energy must demonstrate a burden on commerce; and (b) the indisputable heavy burden on New Energy is not enough. Since the statute is facially discriminatory, the issue of burden does not even arise.[11] But even if that issue where relevant, appellees make no effort even to distinguish the many cases cited by appellant in which only *one* out-of-stater was shown to be affected. See Appellant's Br. 21-22. Moreover, no case has required an actuarial demonstration that the flow of commerce was actually diminished. There was no evidence in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) that fewer apples had come into North Carolina from out-of-state sources, nor in *Lewis v. BT Inv. Mgrs, Inc.*, 447 U.S. 27 (1980) that there were fewer investment entity transactions because BT Investment managers were excluded. See 447 U.S. at 39-40 (1980) (many other out-of-state investment enterprises available to enter the local markets.)[12]

Furthermore, no case has required such precise tracing of who obtained the business lost by the excluded entity, for that would be an impossible task. Thus, in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), the Court struck down a tax because of an exemption granted only local manufacturers, even though the burden was only "hypothetical" and depended on "another state lev[ying] a corresponding tax." The Court refused to require Armco "to prove actual discriminatory impact." 467 U.S. at 644.

Finally, the test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), on which appellees purport to rely, provides that "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, *and on whether it could be promoted with a lesser impact on interstate activities.*" 397 U.S. at 142. (emphasis added) (Both appellees omit the italicized portion of this sentence in their references to the *Pike* test. See Ohio Br. pp. 16, 21, 27, 28; South Point Br. pp. 19, 27, 28, 29, 31).) Even if, contrary to the trial court's finding, promoting health through a cleaner environment were indeed the purpose of Ohio's reciprocity provision, Ohio could obviously achieve that goal by encouraging ethanol to come in to displace gasoline, no matter where or how the ethanol was produced, and regardless of how the foreign ethanol's home state treated Ohio ethanol.

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[11] On its face, the reciprocity provision: (1) treats Ohio-produced ethanol differently from ethanol produced elsewhere; (2) treats ethanol produced in states that give a credit differently from ethanol produced in states that do not. Compare *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. at 333 (discrimination "between two kinds of interstate transactions" forbidden).

[12] Ohio also suggests that "if New Energy ceases doing business in Ohio . . . New Energy has not even established that the Ohio producer has the capacity to fill any void in the market." Ohio Br. 23. But South Point itself implicitly conceded it had such capacity—its sales in Indiana had fallen sharply, when New Energy began operations. J.A. 132-33, which was, of course, the reason it lobbied Ohio to force reinstatement of the Indiana tax credit in order to try to recapture and possibly expand its share of the Indiana market.

CONCLUSION

The decision of the Ohio Supreme Court upholding Ohio Rev. Code 5735.145(B) should be reversed.

Respectfully submitted,

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APPENDIX

ALCOHOL OUTLOOK, p. 6

March, 1988

November 1987 Gasoline & Ethanol-Blend Utilization

	Total (000)	Unleaded (000)	Unl. Prem. (000)	Ethanol/ Gas (000)	Blends % Mkt.	Yr. Ago % Change
PAD-I	3,240,250	1,537,563	966,438	39,919	1.23	−36%
CT*	131,600	61,089	46,942		ERR	ERR
ME	49,041	27,527	8,518			
MA	199,799	101,158	66,513			
NH	41,035	21,218	11,584			
RI*	30,900	14,060	10,166			
VT*	212,995	113,825	52,099			
DE	26,610	14,590	6,613			
DC	17,800	6,194	9,804			
MD	170,003	78,592	58,889	100*		−93%
NJ*	251,200	121,681	89,729			
NY*	481,504	215,040	183,020			
PA	341,219	164,843	86,499	605*	0.18	−87%
FL*	318,211	140,936	104,023	10,655*	3.35	32%
GA	274,610	127,254	70,437	1,000*	0.36	−66%
NC	264,440	122,462	57,251	2,100*	0.79	−69%
SC	123,967	59,169	24,967	4,586	3.70	206%
VA	227,495	110,017	62,061	20,423	8.98	−23%
WV*	77,821	37,907	17,323	450*	0.58	−55%
PAD-II	2,777,376	1,505,881	376,400	469,895	16.92	15%
IL	351,815	204,651	61,357	119,675*	34.02	6%
IN*	259,611	135,335	35,593	51,870*	19.98	−13%
IA	104,427	56,150	6,015	31,638	30.30	14%
KS	99,665	55,204	6,329	8,057	8.08	−47%
KY	207,045	96,835	35,964	58,199	28.11	−10%
MI	353,091	205,030	49,186	39,959	11.32	18%
MN*	161,800	96,740	11,779	16,666*	10.30	−20%
MO	209,507	110,850	25,748	3,500*	1.67	
NE	58,005	30,632	2,181	18,622	32.10	25%
ND	28,657	12,835	963	2,755	9.61	−65%
OH*	412,100	232,424	75,546	77,300*	18.76	−3%
OK	130,626	65,927	8,216	4,000*	3.06	−64%
SD*	35,655	16,637	1,366	5,290*	14.84	−1%
TN	201,707	89,618	40,079	31,679	15.71	−17%
WI	163,665	93,011	16,170	685	0.42	37%
PAD-III	1,365,886	663,029	254,026	87,236	6.39	−8%
AL	164,809	72,879	35,319	34,780	21.10	50%
AR	161,710	73,578	24,839	311*	0.19	522%

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	Total (000)	Unleaded (000)	Unl. Prem. (000)	Ethanol/ Gas (000)	Blends % Mkt.	Yr. Ago % Change
LA	157,928	79,375	41,440	9,426	5.97	−69%
MS	99,036	44,715	18,312	405*		
NM	67,010	35,931	3,987	8,167	12.19	49%
TX	715,393	356,552	130,130	34,147	4.77	−6%
PAD-IV	282,562	139,794	18,988	6,682	2.36	80%
CO	117,594	62,995	10,360	3,048	2.59	22%
ID	46,000	18,731	1,366	3,229	7.02	375%
MT	32,803	15,194	666	130	0.40	−69%
UT*	62,100	31,286	5,496	250*	0.40	150%
WY*	24,065	11,587	1,100	25*	0.10	150%
PAD-V	1,565,181	785,144	305,512	45,470	2.91	43%
AK	17,301	8,701	1,062	48		
AZ*	128,605	67,505	14,841	102*		
CA*	1,050,605	543,058	239,643	32,996*	3.14	55%
HI	26,123	15,598	5,653			
NV	56,335	28,675	6,428	7,520		
OR	126,946	54,561	14,599	45*	0.04	50%
WA	176,567	75,747	24,349	4,807	2.72	−30%
U.S. TOTALS	9,231,255	4,631,410	1,921,364	649,202	7.03	8%

*Projected by Information Resources Incorporated
Gasoline and Ethanol/Gasoline Blend Figures are in U.S. Gallons.
Information for this chart was compiled by DOT and IRI.